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No. 91-127

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

S.M. PIRES and VIRGINIA PIRES, his wife,

Petitioners,

vs.

FROTA OCEANICA BRASILEIRA S.A.,

Respondent,

EDUARDO LOPEZ as Executor for the Estate of FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES INC., J. DIXON BYRNE as Executor for the Estate of JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

REPLY BRIEF OF PETITIONERS

KENNETH HELLER
Attorney for Petitioners
335 Broadway, Suite 614
New York, New York 10013
(212) 962-6085

Dick Bailey Appellate Printers ► Tel.: 1-800-564-4918 ◄
(212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848
Fax Number: (718) 273-8031

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REPLY BRIEF OF PETITIONERS

Respondent does not doubt nor does he controvert the issue being presented to this Court: that the New York Court of Appeals and the Second Circuit Court of Appeals refuse to follow the United States Supreme Court rulings of *Tenant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29,

35 (1944); *Lavender v. Kurn,* 327 U.S. 645 (1945); *Schultz v. Pennsylvania Railroad,* 350 U.S. 522 (1956); *Tiller v. Atlantic Coast Railway,* 318 U.S. 54 (1943); *Gallick v. Baltimore & Ohio Railroad Co.,* 372 U.S. 108 (1963); *Rogers v. Missouri Pacific Co.,* 352 U.S. 500, 506, (1957); *Ferguson v. Moore-McCormack,* 352 U.S. 521 (1957); *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U.S. 36 (1943); *Braen v. Pfeifer Oil Transport Co.,* 361 U.S. 129 (1959); *Hopson v. Texaco,* 383 U.S. 262 (1966); and *Sinkler v. Missouri Pacific,* 356 U.S. 326 (1958), which require submitting the issue of causation to a jury for determination. In a Jones Act, Breach of Warranty of Seaworthiness and General Maritime Law case, the issue of proximate cause is an issue of fact that must be resolved by the jury. It cannot be decided as a matter of law by the Court, unlike a Court in a land based tort case where the common law applies.

The Third, Fifth, Sixth, and Seventh Circuits have followed the Supreme Court rule of submitting the issue of causation to the jury, while the Ninth Circuit is split. Only the Second Circuit and the New York State Court of Appeals have refused to follow the United States Supreme Court rule and broken away from all the other circuits which have followed the United States Supreme Court.

The case of *Litherland v. Petrolane Offshore Construction Services, Inc.,* 546 F.2d 129 (5th Cir. 1977), cited by respondent at page 10, follows the United States Supreme Court rule of submitting the issues of causation to the jury because it is an issue of fact, noting "we accord the jury's verdict traditional respect given to the finder of facts."

The fact that the Pires accident happened off the ship does not prevent a finding of proximate cause and liability. See Point II, pages 15-21 of Petition, citing *O'Donnell,*

Braen, Aguilar, Hopson, and *Sinkler, supra.*

Respondent misrepresents the case of *Middle East Engineering & Development Co. Ltd., v. Arkwright-Boston,* 675 F. Supp. 855 (S.D.N.Y. 1987) as a Second Circuit case holding that a judge may not add prejudgment interest to a jury award. In fact, this is only a District Court case. The Second Circuit case of *Earl v. Bouchard Transportation,* 917 F. 2d 1320 (2 Cir. 1990) approved the award of prejudgment interest.

POINT I

THE CASE IS RIPE FOR REVIEW

Respondent states that the petition for a writ of certiorari should be denied because this case is not ripe for review. As the Court pointed out in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029 (1975), cited by respondent at page 7 of its opposing brief, complete finality is not necessary to confer jurisdiction upon the Court to grant a writ. Rather, as the Court pointed out at 420 U.S. 477, 478, 95 S. Ct. 1037, a state judgment is final within the meaning of 28 U.S.C. §1257, where additional proceedings would not require the decision of other federal questions that might also be required by the Court at a later date and immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice.

This is just such a case. The issue before the Court is a separate federal question which has been taken as far as possible in the New York State Court system. Respondent makes much of the fact that the New York Court of Appeals denied petitioner's motion for leave to appeal to that

Court on the ground that the order of the Appellate Division from which petitioner sought to appeal did "not finally determine the action within the meaning of the Constitution" [of the State of New York].

The finality requirement for appeal to the New York Court of Appeals is more stringent than the corresponding requirement of this court. See, for example §5611 of the New York Civil Practice Law and Rules which states:

> "If the Appellate Division disposes of all the issues in the action its order shall be considered a final one."

The necessity of a complete disposition of all aspects of the case is simply not a factor in determining whether to issue a writ of certiorari. See *Cox Broadcasting, supra,* and *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S. Ct. 1221 (1949).

This case, therefore, is ripe for review by way of writ of certiorari. This application should be treated on the merits.

POINT II

THE STATE COURT DETERMINATION SOUGHT TO BE REVIEWED CONFLICTS WITH SETTLED FEDERAL LAW.

The Appellate Division of New York granted respondent's motion for summary judgment on the Jones Act aspect of this case, because of the alleged lack of a causal connection between the negligence of the ship's officers and the occurrence (3a). In so doing that Court overlooked this Court's holding in the landmark case of *Ferguson v. Moore-McCormack Lines,* 352 U.S. 522, 77 S.Ct. 457 (1957).

In *Ferguson, supra,* plaintiff, a ship's baker, sustained severe injuries while using a knife in attempting to remove frozen ice cream from its container, so that it could be quickly served to the passengers. The United States Court of Appeals for the Second Circuit, 228 F. 2d 891, had reversed a judgment entered on a jury verdict in plaintiff's favor, and dismissed the complaint, holding that as a matter of law, it was not reasonably foreseeable that plaintiff would use a knife for that purpose.

In reversing the Court of Appeals, this Court pointed out that the standard of liability in a Jones Act case is not the same as in common-law negligence. Rather, it is the standard established by Congress under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* Quoting from the companion case of *Rogers v. Missouri Pacific Railroad Co.,* 352 U.S. 500, 77 S.Ct. 443 (1957), Justice Douglas, speaking for the Court said:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought." (Emphasis supplied).

Applying that standard, the Appellate Division's grant of summary judgment was plainly erroneous. The Appellate Division treated this as a common-law negligence case. As *Ferguson* demonstrates, it is not.

The real issue in this case is the liability of shipowners under the Jones Act and under the doctrine of unseaworthiness, for accidents to seamen in the service of the vessel while ashore. The Appellate Division, relying on *Wheeler v. West India S.S. Co.,* 103 F. Supp. 631, affd. 205 F. 2d 354, a Second Circuit case, held that no recovery could be had under such circumstances (4a).

The Second Circuit stands alone on this point. The *Wheeler* decision is at odds with *Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129 (1959); *Hopson v. Texaco Inc.*, 383 U.S. 262 (1966); *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 U.S. 36 (1943) and *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 633 S. Ct. 930 (1923). All these cases state that off-vessel accidents to Jones Act seamen are not subject to automatic dismissal because of their locations. The *Wheeler* decision was handed down prior to this Court's *Braen* and *Hopson* decisions, *supra.*

As we pointed out at page 5 of our petition herein, the Third, Fifth, Sixth and Seventh Circuits follow *Braen* and *Hopson.* The pertinent citations are set forth at page 21 of the petition. The Ninth Circuit appears to be split between the decisions of two of its panels. Compare *Williamson v. Western Pacific Dredging Co., 441 F. 2d 65 and Bates v. Prudential Grace Lines,* 375 F. Supp. 774, 497 F. 2d 900.

In the interests of uniform interpretation of the Jones Act, the writ of certiorari should be granted so as to resolve this conflict.

POINT III

THE APPELLATE DIVISION'S REFUSAL TO ALLOW PREJUDGMENT INTEREST ON THE AWARD OF MAINTENANCE AND CURE WAS ERRONEOUS.

The Trial Court pointed out, correctly, that the awarding of prejudgment interest in maintenance and cure cases, while discretionary, is the rule and not the exception (2a). See to the same effect, the cases cited at page 28 of our petition herein.

In mistaken reliance on certain Fifth Circuit cases (5a) the Appellate Division overturned the Trial Court's award of interest on maintenance and cure. The Appellate Division cited *Havis v. Petroleum Helicopters Inc.*, 664 F. 2d 54 (5th Cir. 1981) and *Morales v. Garijak, Inc.*, 829 F. 2d 1355, 1361 (5th Cir. 1987). In *Havis,* the Court awarded pre-judgment interest, at the rate prescribed by the state having the most contact with the case, despite the fact that the matter of interest had not been submitted to the jury.

The *Morales* court misconstrued *Havis.* Citing *Havis,* the Court held that, because the issue of interest had not been submitted to the jury, interest could not be awarded. Of course, *Havis* said nothing of the sort. In fact, it said the exact opposite. Nevertheless, the Appellate Division cited *Morales* and miscited *Havis,* while ignoring all other authority to the contrary.

If *Morales* is now the law in the Fifth Circuit, it is at odds with the cases cited at page 28 of our petition. For the sake of uniformity, the writ should be granted.

CONCLUSION

THE WRIT SHOULD ISSUE

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New York, New York
July 26, 1991

Respectfully submitted,

KENNETH HELLER
Attorney for Petitioners
335 Broadway
Suite 614
New York, New York
(212) 962-6085